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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALBERD HARUTYUNTAN,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

B244711

(Super. Ct. No. BA382866)

ORIGINAL PROCEEDINGS. Petition for Writ of Prohibition. Kathleen Kennedy, Judge. Petition granted in part; denied in part.

Ronald L. Brown, Los Angeles County Public Defender, Albert J. Menaster, Rebecca Bernhart and Robin Bernstein-Lev, Deputy Public Defenders, for Petitioner.

No appearance on behalf of Respondent.

Jackie Lacey, Los Angeles County District Attorney, Irene Wakabayashi, Patrick D. Moran and Shirley S.N. Sun, Deputy District Attorneys for Real Party in Interest.

Defendant, Alberd Harutyuntan, challenges the denial of his Penal Code¹ 995 motion to dismiss a section 190.2, subdivision (a)(10) witness killing special circumstance. We issued an alternative writ of prohibition limited solely to the section 190.2, subdivision (a)(10) witness killing special circumstance issue. We grant defendant's prohibition petition solely as it relates to the section 190.2, subdivision (a)(10) witness killing special circumstance allegation.

This case involves four homicides directed at three members of one family and a prostitute. The chronological order of the killings is as follows. Counts 2 and 3 charge defendant with two murders on December 11, 2008. Count 2 charges defendant with the murder of Khachik Safaryan who was found dead in a family residence's bedroom. Mr. Safaryan is the husband of Karine Hakobyan and the father of Lusine Safaryan. Count 3 charges defendant with the Lusine Safaryan's murder. Count 3 contains the following special circumstance allegation concerning Lusine's murder, "It is further alleged as to Count 3 that the murder of Lusine Safaryan was committed by defendant . . . and that Lusine Safaryan was a witness to a crime who was intentionally killed for the purpose of preventing her testimony in a criminal proceeding, but that said killing was not committed during the commission and attempted commission of the crime to which she was a witness, within the meaning of Penal Code section 190.2(a)(10)." Lusine was discovered shot to death in the family residence's living room. It is this special circumstance allegation that is the subject of this opinion.

Count 4 charges defendant with the murder of Julie Kates on March 11, 2010. Ms. Kates was a prostitute shot to death at the corner of Kingsley Avenue and Sunset Boulevard. Count 1 charges defendant with the March 26, 2010 murder of Ms. Hakobyan. As noted, Ms. Hakobyan is Mr. Safaryan's spouse and Lusine's mother. Ms. Hakobyan was shot to death in her car in a parking space behind her apartment. Other special circumstance allegations are alleged but they are not pertinent to this extraordinary writ proceeding.

¹ Future statutory references are to the Penal Code.

Section 190.2, subdivision (a)(10) states in part, “The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal . . . proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness” The witness killing special circumstance has three elements: the victim witnessed a crime prior to and separate from his or her killing; the killing was intentional; and the purpose was to prevent the victim from testifying about the crime he or she had witnessed. (*People v. Stanley* (1995) 10 Cal.4th 764, 801; *People v. Garrison* (1989) 47 Cal.3d 746, 792.) At issue here is the first element which our Supreme Court has defined thusly: “As to the first element, a crime is not “‘prior to, and separate from,’ the killing’ if it is part of “‘one continuous transaction” or “the same continuous criminal transaction.”” [Citations.]” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 655, citing *People v. Benson* (1990) 52 Cal.3d 754, 785.)

The limited scope of the witness killing special circumstance was described in *San Nicolas* as follows: “In [*People v.*] *Silva* [(1988) 45 Cal.3d 604], the defendants kidnapped and robbed a couple, Kevin and Laura. They killed Kevin, repeatedly raped Laura, and then decided that Laura ‘would have to be killed because she would know too much.’ (*Silva, supra*, 45 Cal.3d at p. 631.) We reversed the witness-killing special-circumstance allegation, because the kidnapping, robbery, and murder were ‘part of the same continuous criminal transaction.’ (*Ibid.*) In *Benson*, defendant killed a mother who lived with her three children, killed her son, molested her two young daughters for two days, and ultimately killed them as well “‘to protect [the defendant’s] freedom.”” ([*People v.*] *Benson, supra*, 52 Cal.3d at pp. 767-768) As in *Silva*, we found that the murder of the mother and the murder of the daughters ‘were integral parts of a single continuous criminal transaction against the entire family.’ (*Id.* at p. 785.)” (*People v. San Nicolas, supra*, 34 Cal.4th at pp. 614, 655.)

The foregoing is the controlling authority. The evidence indicated: defendant had been a longtime friend of the two victims shot to death on December 11, 2008; defendant was drawn romantically to Ms. Hakobyan, Mr. Safaryan’s spouse; defendant had advised

Mr. Safaryan to leave town in response to a note and a photograph; the photograph was of a woman Mr. Safaryan was seeing; by contrast, Mr. Safaryan's father suggested the police be contacted; defendant tried to talk Mr. Safaryan out of calling the police; the next day both Mr. Safaryan and his daughter, Lusine, were found shot to death in the family residence; and the note and the photograph which were last seen in Mr. Safaryan's possession on the evening of December 10, 2008, were never found after he was shot the following morning and his body discovered later in the afternoon. There is no evidence as to who was shot first, Mr. Safaryan or Lusine. Mr. Safaryan was found shot to death in a family bedroom. Lusine was discovered dead in the living room. Thus, the section 190.2, subdivision (a)(10) witness killing special circumstance must be dismissed. (*People v. Benson, supra*, 52 Cal.3d at pp. 767-768; *People v. Silva, supra*, 45 Cal.3d at p. 631.)

In the respondent court and here, the prosecution relies upon the facts in *San Nicolas*. (*People v. San Nicolas, supra*, 34 Cal 4th at pp. 651-657.) But *San Nicolas* is materially different. In *San Nicolas*, there was evidence the defendant stabbed one victim. The defendant then got up and walked into a bedroom still with the knife in his hand. As he stood in front of the mirror, he noticed the second victim standing behind him. The defendant then stabbed the second victim in her chest. The defendant was asked by the authorities why he stabbed the victim. The defendant said he could not exactly remember why he stabbed the second victim, but said he probably killed her because she was a witness. (*Id.* at p. 652.) Our Supreme Court concluded there was substantial evidence more than one criminal transaction took place. (*Id.* at p. 656.) Our Supreme Court cited as substantial evidence of the accused's motivation his admission that he probably killed the second victim to prevent her from being a witness.

One California Supreme Court case was decided after *San Nicolas* which discusses the witness-murder special circumstance. In *People v. Clark* (2011) 52 Cal.4th 856, 873-876, 952-953, one of the victims survived and testified as to the following facts. The defendant took two minors to a lake intending to engage in consensual sexual intercourse with one of them. Eventually, the defendant attacked one of the minors.

Both minors became frightened and decided they would lie to their parents about having got into a fight at a movie theater. The defendant returned and one of the minors explained how they were going to explain the injuries to their parents. According to the *Clark* opinion, the following then occurred: “When Laurie informed defendant about how they planned to explain to their parents what happened, defendant responded, ‘No, I don’t trust you. You’ll tell like you did last time.’” (*Id.* at p. 953.) The defendant killed one of the minors and was convicted of the attempted murder of the other. In our case, there is no substantial evidence of defendant’s intention to silence a witness as in *San Nicolas* and *Clark*.

Other than the section 190.2, subdivision (a)(10) witness killing special circumstance issue, defendant’s contentions have no merit. Our order limiting the scope of the alternative writ of prohibition to the section 190.2, subdivision (a)(10) witness killing special circumstance constituted our ruling on the other contentions’ merits. (Cf. *In re Price* (2011) 51 Cal.4th 547, 559; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1542.) Defendant has failed make a prima facie showing of entitlement to any relief on any other issue. (§ 939.71; *People v. Snowdy* (1965) 237 Cal.App.2d 677, 682-683.)

The prohibition petition is granted to the limited extent discussed in this opinion. Upon remittitur issuance, the respondent court is to grant defendant’s section 995 dismissal motion as to the section 190.2, subdivision (a)(10) witness killing special circumstance. The prohibition petition is denied in all other respects.

TURNER, P. J.

We concur:

KRIEGLER, J.

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.